THE HONOURABLE SRI JUSTICE V.ESWARAIAH

WRIT PETITION NO.16907 of 2004

Dated:10-07-2006

BETWEEN:

J.A.Rahman Khan Petitioner

And

A.P.State Wakf Board, Haj House, Nampally, Hyderabad,
rep. by its Chief Executive Officer and another.
Respondents

THE HONOURABLE SRI JUSTICE V.ESWARAIAH

WRIT PETITION NO.16907 OF 2004

ORDER:

Heard the learned counsel appearing for the petitioner as well as both the learned counsel appearing for respondents 1 and 2.

The writ petition was allowed earlier by order dated 21-11-2005, but the said order in W.P.No.16907 of 2004 is set-aside by allowing the review petition in W.P.M.P.No. 6884 of 2006 today itself. Immediately after disposal of the review petition, the W.P.No.16907 of 2004 is restored on its file.

Both the counsel insisted for disposal of the main writ petition itself and accordingly the counsel appearing for the respective parties have been heard.

It is the case of the petitioner that Sunni Idgah is situated in Kurnool town under Towliath of Khazi Syed Asadulla Hussaini. After his death, his daughter Smt.Salma Bee was nominated as Muthawalli and her husband Syed Shah Abdul Huq was appointed as Shikmidar (Joint Mutawalli). Subsequent to the death of Smt.Salma Bee and Syed Shah Abdul Huq, on the application made by the second respondent to declare him as Muthawalli as he is claiming himself as son-in-law of the original Muthawalli, he was appointed as Muthawalli in the place of late Smt.Salma Bee and Syed Shah Abdul Huq by the impugned proceedings dated 4-6-1997 which were published in the A.P. Gazette dated 3.7.1997. It is further stated that A.P.Wakf Board has issued addendum dated 26.7.2003 stating that the mosque was constructed within the premises of Idgah as per the orders of District Collector dated 23.3.1989 by the managing committee headed by Sri B.Abdul Razzack and requested for registration of the said mosque as a separate institution. But the said request was negatived and the mosque was also notifed as wakf property and the second respondent was shown as Muthawalli for the said mosque also. It is stated that challenging the said addendum dated 26.7.2003, W.P.No.7509 of 2004 was filed by the managing committee of the mosque and this Court granted interim direction in the said writ petition. It is stated that Muthawalli means a person who is appointed under any deed or instrument by which a wakf has been created. The Wakf Board has power to appoint and remove Muthawalli in accordance with the provisions of the A.P. Wakf Act,1995 (for short 'the Act') and as per Section 63 of the Act, Wakf Board has power to fill up the vacancy of Office of Muthawalli of wakf, and there is no one to be appointed under the terms of deed of the wakf, or where the right of any person to act as Muthawalli is disputed, the Board may appoint any person to act as Muthawalli for such period. It is stated that the appointment of the second respondent as Mutawalli without specifying period is illegal, arbitrary and contrary to the orders of this court in C.R.P.No.5537 of 2001 [1] in **Shaik Ghouse Mohiuddin Vs. State Wakf Board and others** which were also confirmed by the Supreme Court in Special Leave-II Appeal (Civil) 3776 of 2002 dated 5.5.2002.

Therefore, the learned counsel appearing for the petitioner submitted that the appointment of the second respondent as Muthawalli by the impugned order on permanent basis is illegal, arbitrary and contrary to Section 63 of the Act.

On the other hand, it is the case of the second respondent that the said Sunni Idgah situated in Kurnool town is registered wakf as per the publication made in the A.P.Gazette dated 24-10-1963 and under serial No.3156 under the Towliath of Khazi Syed Asadullah Husaini. After the death of the original Muthawalli, the A.P. Wakf Board appointed Smt.Salma Bee, daughter of Syed Asadullah Hussaini as Muthawalli and her husband Sri Syed Shah Abdul Haq, Government Khazi as a Joint Muthawalli of the said Idgah, vide proceedings dated 26-09-1974. Subsequently, Smt.Salma Bee died long back and therefore, her son-in-law Hafiz Syed Saleem Basha filed application dated 13-5-1995 to appoint him as Muthawalli. In the meanwhile, the husband of Smt. Salma Bee i.e. the father-in-law of the second respondent also died on 6-10-1995. Accordingly, the application filed by the second respondent for the transfer of Towliath in his favour in place of his mother-in-law and father-in-law namely Smt.Salma Bee and Syed Shah Abdul Huq was considered. Accordingly, the Inspector Audtitor (wakf) Kunrool (West) submitted his report stating that the second respondent is rendering the service to the Idgah and a publication was made in

'Ujwala' paper dated 19-6-1996 calling for objections from whomsoever concerned, if any, within 15 days from the date of publication and as no objections were received, the matter was considered by the Towliath Committee meeting held on 12-5-1997 and Towliath Committee recommended the case of the second respondent to place the same before the Board. Board in its meeting held on 13-5-1997 resolved to appoint the second respondent as Muthawalli in the place of deceased Mutawalli and joint Mutawalli. In pursuance of the Board's resolution dated 13-5-1997, second respondent was appointed as Mutawalli and he has been discharging the duties in accordance with the provisions of the Act by submitting the budget, income and expenditure statements and also paying the wakf fund . Thus, it is the case of the second respondent that he being the Kazi appointed vide gazette notification dated 25-5-1995 and since the mosque is constructed in the complex of Idgah, he was functioning as Muthawalli for the entire Idgah which includes mosque also. It is stated that the facts in the C.R.P.No.5537 of 2001 are entirely different and there was no dispute in the said case and that the Muthawalli was not appointed by succession and there was vacancy arises in the said case. The learned counsel Sri Veera Reddy for the second respondent submitted that the instrument by which the wakf has been created and the manner of appointment of Muthawalli has been indicated and there is no dispute with regard to the registration of the wakf in the instant case. Under Section 37 of the Act, the rule of succession to the office of Muthawalli under the wakf deed or by custom or by usage can be indicated. In the instance case, the wakf indicates the manner of succession to the office of the Muthawalli . It is stated that as per the indication made in the wakf deed, only after the death of original Muthawalli, his daughter and son-in-law were appointed and after the death of daughter and son-in-law of original Muthawalli, the son-in-law of his daughter was appointed and therefore, it is only a change in the management of the registration of the wakf due to the death of the original Miutahwalli and name of the incoming Muthawalli was also entered as per Section 42 of the Act. But the impugned order is not an order passed under Section 63 of the Act. It is stated that under Section 63 of the Act, when there is a vacancy in the office of the Muthawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf, or where the right of any person to act as Mutahwalli is disputed, the Board may appoint any person to act as Muthawalli for such period and on such conditions as it may think fit. In the instant case, it is stated that there is no dispute in case of the second respondent to act as Muthawalli as per the deed of the wakf and there is no vacancy and therefore, the question of appointing Muthawalli for a fixed period under Section 63 does not arise. It is stated that the provisions of Section 63 have no application in the instant case.

It is the case of the first respondent that the second respondent was appointed as Muthawalli by following the procedure in the year 1997 and that the writ petition which has been filed after lapse of the period of seven years is not maintainable and if there is any dispute, only course open to the petitioner is to avail the remedy under Section 70 of the Act and when the rule of succession is hereditary in customs as per survey report, the orders of the appointment of second respondent is not illegal or arbitrary.

Unfortunately, the first respondent also has not indicated or narrated any particulars whether the appointment of the second respondent is under Section 63 of the Act or under the rule of succession in the office of the Muthawalli under the deed of wakf as per the registration of wakf mentioned under Section 37 of the Act by effecting the change in the management of the registration of the wakf due to the death of original muthawalli entering the name of incoming Muthawalli. As the said method and manner are not specifically indicated in the impugned order, I am of the opinion that it may be appropriate to remand the entire matter to the Wakf Board to

reconsider the issue afresh and pass appropriate orders in accordance with law.

The writ petition is allowed. The impugned orders are set-aside and the first respondent is directed to pass fresh order in accordance with law indicating as to whether the appointment of the second respondent is by way of succession under Section 37- C read with Section 42 or under Section 63 of the Act by following due procedure prescribed in law, within six weeks from the date of receipt of a copy of this order. No order as to costs.

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V.ESWARAUAH,J

10-07-2006

Note:
C.C. in one week
B/o.
Stp

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[1] 2002 (1) ALD 751